

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TRANSMITTAL LETTER (GENERAL)
(With Certificate of Mailing by Express Mail)

Applicant/Registrant: Sybaritic, Inc. v. Thomas P. Muchisky
Serial No.: 78/282,661
Registration No.:
Trademark:

TTAB

TO THE COMMISSIONER FOR TRADEMARKS:

Transmitted herewith is/are the following document(s):

Opposer's Motion and Memorandum Seeking Additional Time Pursuant to Federal Rule 56(f) to Conduct Discovery and to Respond to Applicant's Motion for Summary Judgment

Affidavit of Frank B. Janoski in Support of Opposer's Rule 56(f) Motion

Certificate of Mailing via Express Mail

Acknowledgement Postcard



01-20-2006

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Signature

Dated: 1/20/06

Frank B. Janoski
Lewis, Rice & Fingersh, L.C.
500 North Broadway, Suite 2000
Box IP Department
St. Louis, MO 63102

I certify that this document and fee is being deposited on January 20, 2006 with the U.S. Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. 1.10 and is addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.


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CC:

**IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SYBARITIC, INC.,

Opposer,

vs.

THOMAS P. MUCHISKY,

Applicant.

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Opposition No.: 91163999

Serial No. 78/282,661



01-20-2006

U.S. Patent & TMO/TM Mail Rpt Dt: #11

**OPPOSER'S MOTION AND MEMORANDUM SEEKING ADDITIONAL TIME
PURSUANT TO FEDERAL RULE 56(f) TO CONDUCT DISCOVERY AND
TO RESPOND TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Opposer Sybaritic, Inc. ("Sybaritic") and, pursuant to Fed. R. Civ. P. 56(f) and TMEP § 528.06, hereby requests that Applicant Thomas P. Muchisky's ("Muchisky") Motion for Summary Judgment be denied, or in the alternative, that Sybaritic be granted sufficient time of at least sixty (60) days to obtain or otherwise conduct discovery (after relevant documents are produced by Muchisky) related to the issues raised in Muchisky's summary judgment motion, and for an extension of time thereafter of at least thirty (30) days to respond to Muchisky's summary judgment motion. As grounds for this Motion and Memorandum, Sybaritic states as follows:

1. Application Serial No. 78/282,661, filed by Muchisky on August 4, 2003, seeks trademark registration for a claimed mark for an "applicator for hand-held massager." The claimed mark is described in Muchisky's application as "the configuration of an applicator for a hand-held massager. The applicator consists of a cone-shaped attachment having a firm rubber tip" (hereinafter the "cone applicator"). The claimed mark published in the Official Gazette on November 2, 2004.

2. On January 3, 2005, Sybaritic filed a Notice of Opposition.
3. On June 29, 2005, Sybaritic filed its Amended Notice of Opposition.
4. On July 27, 2005, Muchisky filed his Answer to Sybaritic's Amended Notice of Opposition.
5. On August 18, 2005, the Board resumed proceedings in this Opposition.
6. On October 24, 2005, Sybaritic served written discovery on Muchisky, including Requests for Admissions, Interrogatories, and Requests for Production of Documents and Things. See Affidavit of Frank B. Janoski in Support of Opposer Sybaritic, Inc.'s Rule 56(f) Motion (hereinafter "Janoski Aff."), ¶ 3; id., at Ex. 1, Sybaritic's First Requests for Admission; id. at Ex. 2, Sybaritic's First Set of Interrogatories; id. at Ex. 3, Sybaritic's First Set of Requests for Production of Documents and Things.
7. On November 28, 2005, Muchisky served his objections and responses to Sybaritic's written discovery, but did not produce any documents in response to Sybaritic's proffered discovery. See Janoski Aff., ¶ 4; id. at Ex. 4, Muchisky's Responses to Sybaritic's First Requests for Admission; id. at Ex. 5, Muchisky's Answers to Sybaritic's First Set of Interrogatories; id. at Ex. 6, Muchisky's Responses to Sybaritic's First Set of Requests for Production of Documents and Things.
8. On December 16, 2005, Muchisky filed a Motion for Summary Judgment, asserting that "there are no genuine issues of material fact regarding non-functionality, acquired distinctiveness, secondary meaning, and the ability of Applicant's configuration mark to function as a trademark." Memorandum in Support of Applicant's Motion for Summary Judgment at 2 (hereinafter "Muchisky Memo").

9. In his Motion for Summary Judgment and attached Declaration, Muchisky asserts, among other things, that (a) he has continuously used the alleged trademark in connection with his “applicator for hand-held massager” since 1965, see Muchisky Memo at 3; Declaration of Thomas P. Muchisky in Support of Motion for Summary Judgment (hereinafter “Muchisky Decl.”), ¶ 8; (b) total yearly sales of the cone applicator at issue here are more than \$195,000 per year, see Muchisky Memo at 3; Muchisky Decl., ¶ 11; (c) total yearly advertising costs for the cone applicator at issue here are more than \$104,000 per year, see id.; (d) there are numerous alternative designs that are equally efficient and competitive that do not need to use the design of the cone applicator at issue here, see Muchisky Memo at 5; Muchisky Decl., ¶ 13; and (e) the design of the cone applicator at issue here does not result from a comparatively simple or inexpensive method of manufacture. See Muchisky Memo at 5; Muchisky Decl., ¶ 15.

10. On January 19, 2006, the Board suspended proceedings in this Opposition pending disposition of Muchisky’s motion for summary judgment.

11. Pursuant to Fed. R. Civ. P. 56(f) and TMEP § 528.06, the Board may grant a continuance to permit discovery to be taken for a party opposing a summary judgment motion. A nonmoving party that believes that it cannot effectively oppose a motion for summary judgment without first taking discovery may file a request with the Board for time to take the needed discovery and must support its request with an affidavit showing that the nonmoving party cannot, for reasons stated therein, present by affidavit facts essential to justify its opposition to the motion. See also Opryland USA Inc. v. Great American Music Show, Inc., 970 F.2d 847, 852-53 (Fed. Cir. 1992) (finding sufficient need for additional discovery); Orion Group, Inc. v. Orion Insurance Co. P.L.C., 1989 TTAB LEXIS 65, *4, 12 U.S.P.Q.2d 1923 (TTAB 1989) (finding Rule 56(f) declaration sufficient).

12. With respect to Muchisky's pending Motion for Summary Judgment, Sybaritic is unable, without certain discovery, to fully respond to Muchisky's Motion and/or to present by affidavit, or other sworn testimony, facts sufficient to show the existence of a genuine issue of material fact for trial on each of the topics raised by Muchisky's Motion. See Janoski Aff., ¶ 11. Specifically, Sybaritic needs to obtain and otherwise conduct specific, limited discovery into several of the contentions contained in Muchisky's Motion for Summary Judgment and his Declaration, outlined above in paragraph 7 and as discussed below.

Usage of the Alleged Trademark:

13. In support of his contention that the alleged trademark has acquired distinctiveness, Muchisky claims that he has continuously used the alleged trademark in connection with his "applicator for hand-held massager" since 1965. See Muchisky Memo at 3; Muchisky Decl., ¶ 8. Muchisky further contends that "[t]his continuous and substantially exclusive use serves to identify him as the source of the applicator in question. See Muchisky Memo at 3.

14. However, Muchisky has also indicated that General Physiotherapy, Inc. and General Theraphysical, Inc., companies purportedly owned by Muchisky, did not own or distribute the cone applicator in question until 1973. See Muchisky Decl., ¶ 5. Muchisky also alleges that the cone applicator in question was originally manufactured and sold by a French company, Societe D'Appareillage Du Sud-Quest, the assets of which later transferred to Societe Industrielle D'Appareillage Medical, and then acquired by Physiotherapie Generale France in 1998, a company in which Muchisky claims to be the majority shareholder. See Muchisky Decl., ¶¶ 2-4. However, Muchisky has not produced any documents in this Opposition showing

that he himself has continuously used the alleged trademark in connection with his “applicator for hand-held massager” since 1965. See Janoski Aff., ¶ 5.

15. Sybaritic has already proffered written discovery seeking information regarding Muchisky’s purported usage and rights in the alleged trademark, which discovery Muchisky has objected to and refused to answer fully or completely, if at all. See, e.g., Janoski Aff., at Ex. 4, Muchisky’s Responses to Request for Admissions Nos. 6-9; id. at Ex. 5, Muchisky’s Responses to Interrogatory Nos. 1-4; id. at Ex. 6, Muchisky’s Responses to Document Request Nos. 3-4, 6. Sybartic has attempted to resolve these discovery disputes without success. See, e.g., Janoski Aff., ¶ 10; id. at Ex. 7, Letter dated Jan. 16, 2006, from Frank B. Janoski to Lionel L. Lucchesi; id. at Ex. 8, Letter dated Jan. 18, 2006, from Lionel L. Lucchesi to Frank B. Janoski.

16. Information about whether or not Muchisky has continuously used the alleged trademark since 1965 and whether or not Muchisky has ownership of rights in that alleged trademark dating back to 1965 is clearly information within Muchisky’s possession, custody, and control and is not readily available to Sybaritic.

17. Accordingly, Sybaritic requests sufficient time to obtain or otherwise conduct discovery (to include the filing of a motion to compel, if necessary) regarding the length and scope of Muchisky’s actual use and ownership of the alleged trademark in question in order to refute Muchisky’s contentions regarding the purported acquisition of distinctiveness.

Yearly Sales:

18. In support of his contention that the alleged trademark has acquired distinctiveness, Muchisky claims that he has sold more than \$195,000 per year of the cone applicator in question. See Muchisky Memo at 3; Muchisky Decl., ¶ 11.

19. Sybaritic has already proffered written discovery seeking information regarding Muchisky's purported sales of the cone applicator in question, which discovery Muchisky has objected to and refused to answer fully or completely, if at all. See, e.g., Janoski Aff., at Ex. 5, Muchisky's Responses to Interrogatory Nos. 15-16; id. at Ex. 6, Muchisky's Responses to Document Request Nos. 5, 8.

20. Despite disclosing purported sales figures to the Board, Muchisky has previously contended he would not disclose such sales figures to Sybaritic in this Opposition proceeding without benefit of a Protective Order. See, e.g., Janoski Aff., at Ex. 5, Muchisky's Responses to Interrogatory Nos. 15-16. To meet this concern, Sybaritic has provided Muchisky with a proposed Protective Order. See Janoski Aff., ¶ 10.

21. At the same time he has refused to disclose such information to Sybaritic, Muchisky has simultaneously contended that this sales information is already in the possession of Sybaritic. See Janoski Aff., at Ex. 6, Muchisky's Responses to Document Request Nos. 5, 8. Although General Physiotherapy had produced sales documents in separate federal litigation involving different applicators (e.g., two-ball, four-ball, contour sponge, and hot/cold applicators), Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing his sales figures for the cone applicator in question. See Janoski Aff., ¶ 6. Moreover, the documents produced in the federal litigation relating to the sales of different applicators appear to show sales significantly below the sales Muchisky attributes to the cone applicator in question here, calling into serious question Muchisky's proffered sales figures. See id.

22. Information about Muchisky's purported sales of the cone applicator in question in this Opposition is clearly information within Muchisky's possession, custody, and control and is not readily available to Sybaritic in this opposition.

23. Accordingly, Sybaritic requests sufficient time to obtain or otherwise conduct discovery (to include the filing of a motion to compel, if necessary) regarding Muchisky's purported sales of the applicator in question in order to refute Muchisky's contentions regarding the purported acquisition of distinctiveness.

Yearly Advertising:

24. In support of his contention that the alleged trademark has acquired distinctiveness, Muchisky claims that total yearly advertising costs for the applicator at issue in this Opposition are more than \$104,000 per year. See Muchisky Memo at 3; Muchisky Decl., ¶ 11.

25. Sybaritic has already proffered written discovery seeking information regarding Muchisky's purported advertising expenditures for the applicator in question, which discovery Muchisky has objected to and refused to answer fully or completely, if at all. See, e.g., Janoski Aff., at Ex. 5, Muchisky's Responses to Interrogatory Nos. 17-18.

26. Despite disclosing purported overall advertising costs to the Board in his Motion for Summary Judgment, Muchisky has previously contended he would not disclose such advertising expenditures (including any documents showing the overall costs referenced in Muchisky's Motion for Summary Judgment) to Sybaritic without benefit of a Protective Order. See, e.g., Janoski Aff., at Ex. 5, Muchisky's Responses to Interrogatory Nos. 17-18. To meet this concern, Sybaritic has provided Muchisky with a proposed Protective Order. See Janoski Aff., ¶ 10.

27. Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing advertising expenditures for the cone applicator in question. See Janoski Aff., ¶ 7.

28. Muchisky is claiming that his advertising expenditures for the cone applicator in question account for more than fifty percent (50%) of his gross sales of the same applicator. This would appear to be an extraordinarily high cost to accrue on a yearly basis for an applicator Muchisky simultaneously claims is well-known in the market. Thus, Muchisky's proffered figures are inherently suspect in this regard.

29. Information about Muchisky's purported advertising expenditures with respect to the applicator in question in this Opposition is clearly information within Muchisky's possession, custody, and control and is not readily available to Sybaritic in this opposition.

30. Accordingly, Sybaritic requests sufficient time to obtain or otherwise conduct discovery (to include the filing of a motion to compel, if necessary) regarding Muchisky's purported advertising expenditures for the applicator in question in order to refute Muchisky's contentions regarding the purported acquisition of distinctiveness.

Purported Alternative Designs:

31. In support of his contention that his design is non-functional, Muchisky asserts that there are numerous alternative designs that are equally efficient and competitive that do not need to use the design of the cone applicator at issue in this Opposition. See Muchisky Memo at 5; Muchisky Decl., ¶ 13. Muchisky has attached a "small sample" of alternative designs to his Declaration and claims that there are other alternative designs as well. See id.

32. Sybaritic has already proffered written discovery seeking information regarding Muchisky's knowledge of purported alternative designs to the design of the cone applicator at

issue in this Opposition, which discovery Muchisky has objected to and refused to answer fully or completely, if at all. See, e.g., Janoski Aff., at Ex. 5, Muchisky's Responses to Interrogatory Nos. 10, 23; id., at Ex. 6, Muchisky's Response to Document Request No. 15.

33. Incredibly, in his Interrogatory Responses, Muchisky claims that the identification of other competitors' designs having the "same intended function" as Muchisky's alleged mark is "not reasonably calculated to lead to the discovery of relevant evidence" and that "no answer" is required. Id., at Ex. 5, Muchisky's Response to Interrogatory No. 10. Muchisky also claims that this information is available to opposer "by other means," see id., but that he will produce such information to the extent not available to opposer. See id., at Ex. 6, Muchisky's Response to Document Request No. 15. However, Muchisky has produced no such documents in this opposition other than those attached to his Declaration in support of his Motion for Summary Judgment. See id., Janoski Aff., ¶ 8.

34. Given Muchisky's repeated representations, his knowledge of alternative designs to the design of the cone applicator at issue in this Opposition is clearly information within Muchisky's possession, custody, and control and is not readily available to Sybaritic in this opposition.

35. Accordingly, Sybaritic requests sufficient time to obtain or otherwise conduct discovery (to include the filing of a motion to compel, if necessary) regarding Muchisky's purported knowledge of alternative designs to the design of the cone applicator at issue in this Opposition.

Method of Manufacture:

36. In support of his contention that his design is non-functional, Muchisky conclusorily asserts that his alleged design does not result from a comparatively simple or inexpensive method of manufacture. See Muchisky Memo at 5; Muchisky Decl., ¶ 15. Muchisky offers no documents or other evidence in support of this contention.

37. Sybaritic has already proffered written discovery seeking information regarding Muchisky's construction of the cone applicator at issue in this Opposition, which discovery Muchisky has objected to and refused to answer fully or completely, if at all. See, e.g., Janoski Aff., at Ex. 6, Muchisky's Response to Document Request Nos. 11-13. Muchisky asserts that this information is already in the possession of Opposer. See id. However, Sybaritic is not aware of any documents produced by Muchisky in this Opposition proceeding (or in the federal litigation regarding different applicators) that discuss whether or not Muchisky's alleged design results from a comparatively simple or inexpensive method of manufacture. See id., ¶ 9.

38. The simplicity and cost of Muchisky's method of manufacture is clearly information within Muchisky's possession, custody, and control and is not readily available to Sybaritic in this opposition.

39. Accordingly, Sybaritic requests sufficient time to obtain or otherwise conduct discovery (to include the filing of a motion to compel, if necessary) regarding Muchisky's method of manufacture for the cone applicator at issue in this Opposition.

40. "It is well settled that the granting of a motion for summary judgment is inappropriate where the responding party has been denied discovery needed to enable it to respond to the motion." Orion Group, 1989 TTAB LEXIS 65, *4, 12 U.S.P.Q.2d 1923 (citing Dunkin' Donuts of Am., Inc. v. Metallurgical Exoproducts Corp., 6 U.S.P.Q.2d 1026 (Fed. Cir.

1988)). Where the opposer has “set forth specific issues of fact on which it asserts it needs information which is in applicant’s control,” and where the types of factual issues are “central issues” in the opposition proceeding, the opposer “is entitled to discovery thereon prior to responding to applicant’s motion for summary judgment.” Id.; see also Opryland, 970 F.2d at 852 (“Since [opposer] has shown a sufficient basis for its need of additional discovery, it can not be deprived of the discovery needed to place at issue material factual questions in opposition to the motion. That is the safeguard to which Rule 56(f) is directed. . . . Thus, when the discovery is reasonably directed to ‘facts essential to justify the party’s opposition’, in the words of Rule 56(f), such discovery must be permitted or summary judgment refused.”).

41. Sybaritic accordingly requests sufficient time, of not less than sixty (60) days to conduct discovery (to include the taking of depositions and the filing of a motion to compel, if necessary) on the topics identified above and any other issues relating to Muchisky’s Motion for Summary Judgment. The requested extension of time will permit a reasonable opportunity for Sybaritic to conduct discovery regarding the topics listed above.

42. Sybaritic further requests sufficient time, of not less than thirty (30) days after the close of this Rule 56(f) discovery period, to file its response to Muchisky’s Motion for Summary Judgment. The requested extension of time will permit a reasonable opportunity for Sybaritic to prepare a response based on the discovery gained during the interim discovery period identified above.

43. The instant Motion is made for the purposes stated herein and not for unnecessary delay or other improper purpose.

WHEREFORE, Opposer Sybaritic, Inc. respectfully requests that the Board grant Sybaritic sufficient additional time, or at least sixty (60) days, in which to obtain or otherwise

conduct discovery (after relevant documents are produced) regarding (a) Muchisky's usage of the alleged trademark, (b) Muchisky's purported sales of the applicator in question, (c) Muchisky's purported advertising costs with respect to the applicator in question, (d) Muchisky's knowledge of alleged alternative designs, and (e) Muchisky's knowledge of the comparative simplicity and expense for the method of manufacture for the design in question, and any other issues relating to Muchisky's Motion or production of documents. Opposer Sybaritic, Inc. further requests additional time from the end of this Rule 56(f) discovery period, or at least thirty (30) days, in which to file a response to Muchisky's Motion for Summary Judgment, and for such other and further relief as the Board deems just and proper.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

By: 

Frank B. Janoski

Bridget Hoy

500 North Broadway, Suite 2000

St. Louis, MO 63102

Telephone: (314) 444-7600

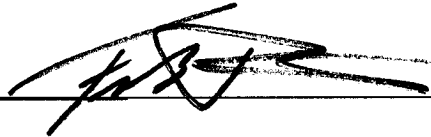
Facsimile: (314) 241-6056

Attorney for Opposer
Sybaritic, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **OPPOSER'S MOTION AND MEMORANDUM SEEKING ADDITIONAL TIME PURSUANT TO FEDERAL RULE 56(f) TO CONDUCT DISCOVERY AND RESPOND TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** was served, via U.S. Postal Service, first class postage prepaid, this 20th day of January, 2006, upon the following:

Lionel L. Lucchesi
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131



4. On November 28, 2005, Muchisky served his objections and responses to Sybaritic's written discovery, but did not produce any documents in response to Sybaritic's proffered discovery. True and accurate copies of Muchisky's responses to the written discovery propounded by Sybaritic are attached hereto at Exs. 4 - 6.

5. To my knowledge, Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing that he himself has continuously used the alleged trademark in connection with his "applicator for hand-held massager" since 1965.

6. To my knowledge, Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing his sales figures for the cone applicator in question. Documents produced in the pending federal litigation between Sybaritic and General Physiotherapy relating to the sales of different applicators not at issue in this Opposition proceeding appear to show sales by General Physiotherapy significantly below the sales Muchisky attributes to the cone applicator in question here.

7. To my knowledge, Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing his advertising expenditures for the cone applicator in question.

8. To my knowledge, Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing his knowledge of alternative designs to the design of the cone applicator in question, other than the small sample of documents attached to Muchisky's Declaration in support of his Motion for Summary Judgment.

9. To my knowledge, Muchisky has not specifically identified or produced any documents in this Opposition proceeding showing or discussing whether or not Muchisky's alleged design results from a comparatively simple or inexpensive method of manufacture.

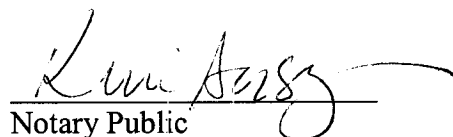
10. Counsel for Sybaritic has attempted to resolve these discovery issues with counsel for Muchisky without success. See Letter dated January 16, 2006, from Frank B. Janoski, counsel for Sybaritic, to Lionel L. Lucchesi, counsel for Muchisky (attached hereto as Ex. 7); Letter dated January 18, 2006, from Lionel L. Lucchesi to Frank B. Janoski (attached hereto as Ex. 8). Contemporaneously herewith, counsel for Sybaritic has also provided Muchisky with a proposed Protective Order. See Letter dated January 20, 2006, from Frank B. Janoski to Lionel L. Lucchesi (attached hereto as Ex. 9).

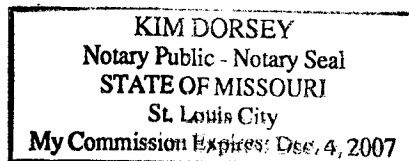
11. With respect to Muchisky's pending Motion for Summary Judgment, it is my belief that, without certain discovery, including that identified above and in Sybaritic's Rule 56(f) Motion contemporaneously filed herewith, Sybaritic is unable to fully respond to Muchisky's Motion and/or to present by affidavit, or other sworn testimony, facts sufficient to show the existence of a genuine issue of material fact for trial on each of the topics raised by Muchisky's Motion.

By 
Frank B. Janoski

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

Sworn to and subscribed before me this 20th day of January, 2006.


Notary Public



My commission expires:

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

RESPONSE:

REQUEST FOR ADMISSION NO. 2:

Muchisky represented to the United States Patent and Trademark Office that Muchisky was the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 3:

Muchisky took no steps to inform the United States Patent and Trademark Office that Muchisky was not the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 4:

Muchisky, as an individual, has made no sales of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 5:

Muchisky, as an individual, has not incurred any advertising expenses promoting applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 6:

Other entities besides Muchisky and/or Muchisky's related entities have placed trademarks on applicators or associated packaging for the applicators having the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 7:

Muchisky is not the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 8:

Muchisky represented to the United States Patent and Trademark Office that Muchisky was the owner of the French Trademark Registration that was submitted as Exhibit B along with

Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 9:

Muchisky took no steps to inform the United States Patent and Trademark Office that Muchisky was not the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 10:

Muchisky and/or an agent of Muchisky contacted Norris Enterprises which resulted in a letter being sent to Muchisky or an agent of Muchisky that was submitted as Exhibit C along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 11:

The letter that was submitted as Exhibit C along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 does not state that the configuration of the

applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is an identifier of the source of the goods.

RESPONSE:

REQUEST FOR ADMISSION NO. 12:

Muchisky and/or an agent of Muchisky contacted Cynthia Edwards or an agent of Cynthia Edwards which resulted in a letter being sent to Muchisky or an agent of Muchisky that was submitted as Exhibit D along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 13:

The letter that was submitted as Exhibit D along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 does not state that the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is an identifier of the source of the goods.

RESPONSE:

REQUEST FOR ADMISSION NO. 14:

In Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, Applicant

stated that there are "numerous applicators which provide virtually the identical functions" to the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 15:

In Applicant's specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to reduce trigger points; for all varieties of pressure techniques, and; wherever the thumb would normally be used in muscle goading techniques.

RESPONSE:

REQUEST FOR ADMISSION NO. 16:

The rounded tip of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to simulate the surface of a thumb.

RESPONSE:

REQUEST FOR ADMISSION NO. 17:

The rounded tip of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to simulate the pressure applied to a body by a thumb.

RESPONSE:

REQUEST FOR ADMISSION NO. 18:

An applicator, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, would not perform the stated functions without a rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 19:

Applicant is aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 20:

Applicant is aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a cone shaped portion attached to the rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 21:

On or before June 16, 2004, Applicant was aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 22:

On or before June 16, 2004, Applicant was aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a cone shaped portion attached to the rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 23:

In Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, Applicant stated: "There are various hand-held massagers using different applicators, as shown by the attached literature. None of these massagers are identical or even substantially similar to Applicant's particular configuration. These alternative designs are equally efficient and competitive." which were made in reference to third party's applicators that perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 24:

Applicant did not attach any literature in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 as referenced in Request for Admission No. 21.

RESPONSE:

REQUEST FOR ADMISSION NO. 25:

Applicant did not attach any literature in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 illustrating third party alternative designs to an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 26:

On or before June 16, 2004, Muchisky was not aware of a third party's alternative configuration for an applicator that was designed to perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 27:

On or before June 16, 2004, Muchisky did not have in his possession, custody or control any literature of a third party's alternative configuration for an applicator that was designed to perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 28:

Muchisky, through a licensing agreement or other agreement, allowed at least one third party to place the third party's trademark on an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

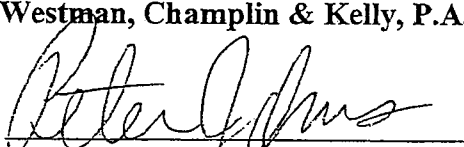
RESPONSE:

Respectfully submitted,

Westman, Champlin & Kelly, P.A.

Dated: October 24, 2005

By:


Nickolas E. Westman

Peter J. Ims

Westman, Champlin & Kelly, P.A.
Suite 1400 – International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 334-2222

**ATTORNEYS FOR OPPOSER
SYBARITIC, INC.**

CERTIFICATE OF SERVICE

I certify that:

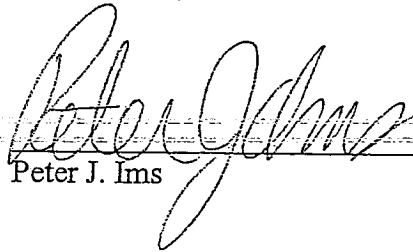
I am over the age of 18 and am not a party to this action. My business address is Westman, Champlin & Kelly, P.A., Suite 1400 - International Centre, 900 Second Avenue South, Minneapolis, MN 55402-3319.

On October 24, 2005, copies of the following documents:

- I. SYBARITIC, INC.'S FIRST SET OF INTERROGATORIES TO THOMAS P. MUCHISKY (NOS. 1 - 30);
- II. SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS TO THOMAS P. MUCHISKY (NOS. 1 -19); and
- III. SYBARITIC, INC.'S FIRST SET OF REQUESTS FOR ADMISSION TO THOMAS P. MUCHISKY (NOS. 1-28)

were delivered via first class, U.S. Mail to:

Lionel L. Lucchesi, Esq.
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131


Peter J. Ims

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.

Opposer,

v.

THOMAS P. MUCHISKY

Applicant.

Opposition No.: 91/163,999

Serial No.: 78/282,661

**SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION
OF DOCUMENTS AND THINGS TO THOMAS P. MUCHISKY (NOS. 1 -19)**

In accordance with Rule 34 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Opposer, Sybaritic, Inc. ("Sybaritic"), requests that Applicant, Thomas P. Muchisky ("Muchisky"), produce the documents requested herein for inspection and copying at the offices of Westman, Champlin & Kelly, P.A., Suite 1400 – International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402. These Document Requests are intended to be continuing in nature. Any information that is discovered after timely service of the answers should be brought to the attention of Sybaritic's counsel through supplemental answers within a reasonable time after discovery.

These Requests for Production of Documents and Things are subject to the following instructions and definitions:

INSTRUCTIONS AND DEFINITIONS

A. The Instructions and Definitions of Opposer's First Set of Interrogatories are incorporated by reference as though set forth fully herein.

B. Photocopies of documents may be produced in lieu of originals when necessary, but all versions of non-identical copies must be produced.

C. If Applicant is aware of any document requested that Applicant is unable to produce, state this fact, give particular reasons for Applicant's inability to produce the document and identify every person Applicant knows or believes has possession, custody or control of the document or of a duplicate thereof.

D. Regarding each document Applicant contends as privileged or otherwise non-discoverable, state the basis for the privilege for exclusion from discovery, the subject matter of the document, the name and address of the author, the document's date, the name and address of the person to whom the document was addressed or for whom it was created, the name and address of any and all recipients of the document, the name and address of each person Applicant believes now has a copy or original of the document, and identify the files and the file location where the original and any copies are normally kept, including any computer files.

E. A request for production of a document is a request for production of the entire document, including any attachments, exhibits, appendices and the like.

DOCUMENTS REQUESTED

REQUEST NO. 1:

Specimens of each label, brochure, display, catalog, advertisement or any other publicly disseminated information ever used by Muchisky in connection with the use, sale, offer for sale, or distribution of goods or services in conjunction with the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 2:

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 3:

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of an alternative design identified in the responses to Interrogatory Nos.: 3 and 6 to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 4:

All documents referring or relating to marketing studies, focus group studies, polls or surveys conducted by or caused to be conducted or obtained for Muchisky that relate to the selection, adoption and/or acquisition of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 5:

All documents referring or relating to the marketing, distribution, sale, advertising, or promotion by Muchisky of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 6:

All documents referring or relating to any person, owner or any other entity having or having had any right to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 including, but not limited to licensing agreements, through or under which Muchisky claims any rights in such alleged mark.

RESPONSE:

REQUEST NO. 7:

All documents referring or relating to each complaint, objection, opposition, administrative proceeding, legal opinion or civil action involving Muchisky's use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 8:

All documents summarizing or memorializing Muchisky's sales of applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 commencing with the date of first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 9:

All documents referring or relating to Sybaritic's making, using and/or selling of an applicator having the exact configuration or a similar configuration to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 10:

All documents that support Muckisky's statements set forth in Muchisky's Answer to Amended Notice of Opposition.

RESPONSE:

REQUEST NO. 11:

All documents that discuss materials of construction of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 12:

All documents that discuss a cone shape as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 13:

All documents that discuss a rounded tip as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 14:

All documents referring to or relating to a third party's use of an applicator having the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

RESPONSE:

REQUEST NO. 15:

All documents referring to or relating to a third party's use of an applicator designed to perform the same functions as stated in response to Interrogatory No. 5 that does not have a configuration the same as or similar to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

RESPONSE:

REQUEST NO. 16:

All documents that were or should have been identified in response to Sybaritic's Interrogatories in this Opposition Proceeding.

RESPONSE:

REQUEST NO. 17:

For each of Sybaritic's Interrogatories in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's answers.

RESPONSE:

REQUEST NO. 18:

For each of Sybaritic's Document Requests in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's responses.

RESPONSE:

REQUEST NO. 19:

All document that were identified or referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

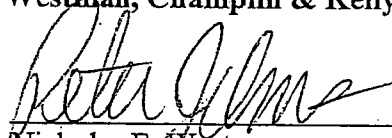
RESPONSE:

Respectfully submitted,

Westman, Champlin & Kelly, P.A.

Dated: October 24, 2005

By:



Nickolas E. Westman
Peter J. Ims
Westman, Champlin & Kelly, P.A.
Suite 1400 – International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 334-2222

**ATTORNEYS FOR OPPOSER
SYBARITIC, INC.**

Serial No.: 78/282,661

As used herein, the term "Opposer" includes Sybaritic, Inc., its predecessors in interest, and all of its parent, subsidiary and affiliated companies and officers, directors, employees, agents and representatives thereof.

B. Applicant.

As used herein, the term "Applicant" includes Thomas P. Muchisky, an individual.

C. Document.

As used herein, the term "document" is used in its customary broad sense as described in Rule 34 of the Federal Rules of Civil Procedure and includes, but is not limited to, all notes, notations, correspondence, invoices, contracts, purchase orders, pamphlets, publications, writings, studies, reports, labels, packaging, books, memoranda, displays, photographs, drawings, art work, tear sheets, proofs, sketches, illustrative materials, videotapes, models, films, magnetic recording tapes, microfilms, and other storage means by which information is retained in retrievable form and all other materials, whether printed, typewritten, handwritten, recorded or reproduced by any mechanical, electronic or magnetic process.

D. Manner of Identifying Documents.

Whenever an Interrogatory inquires about documents, please furnish the following information as to each:

1. The date of the document;
2. A general description of the document;
3. A general description of the subject matter to which it pertains;
4. The names and addresses of the addressor, addressee, and all persons receiving or shown the document or copies thereof;
5. The names and addresses of person in whose custody, possession or control the document is presently maintained; and

6. If a privilege or work product exception is claimed as to a document, identify each such document and state the nature of the privilege or exception claimed.

E. Person.

As used herein, the term "person" includes any individual, corporation, company, division, partnership, agency or other organization or entity.

F. Manner of Identifying Individuals.

Whenever an Interrogatory inquires about a person, and the person is an individual, the information furnished should include:

1. The person's full name;
2. The person's employer;
3. The person's present position or title;
4. The person's past employers and positions or titles at all times relevant to the Interrogatory, if other than the person's present employer, position or title; and
5. The person's last known address and telephone number.

G. Manner of Identifying Persons - Not Individuals.

Whenever an Interrogatory inquires about the name or identity of a person or business, not an individual, the information furnished should include:

1. The full name and current address of such business entity or organization;
2. The name of its executive officer or equivalent authority;
3. The principal place of business; and

4. The nature of the business or function and its relationship to Applicant's operations or products.

H. Manner of Identifying Trademarks, Service Marks and Related Filings.

Whenever an Interrogatory inquires about a service mark, a trademark, or an application or registration for a service mark or trademark, please include:

1. Its country or state;
2. The application or registration number, date of filing and current status;
3. Its date of first use in that country or state and a full description of the goods on which it was first used;
4. The identity of the trademark owner and any and all prior owners or claimants; and
5. The class and description of the goods or services for which it is registered and the class and description of the goods or services for which it is used, if different.

I. Manner of Identifying Goods and Services.

Whenever an Interrogatory inquires as to a service, product or good, please indicate:

1. The catalog, stock or like number;
2. The name, type and grade;
3. Sizes or quantity customarily sold;
4. Whether primarily intended for personal retail consumption, commercial retail consumption or wholesale use; and
5. Any other designation customarily used by Applicant or by the trade to designate such product or good.

J. Construction of 'And' as Well as 'Or' Terms.

As used herein, "and" as well as "or" shall be construed conjunctively or disjunctively as necessary in order to bring within the scope of the Interrogatory all responses which might otherwise be construed to be outside its scope.

K. Construction of Verb Tenses and Singular as Well as Plural Terms.

As used herein, the singular shall always include the plural and the present tense shall always include the past tense, and vice versa.

L. Manner of Identifying Publications.

As used herein, the term "identify" as used in referring to a publication shall include:

1. The title of the publication;
2. The author of the publication;
3. The date; and
4. The relevant page(s).

M. Objections.

If Muchisky objects to any Interrogatory, state the specific grounds for the objection and provide all information, responsive to the Interrogatory, outside the scope of the objection.

O. Assertions of Privilege.

If Muchisky alleges privilege as the basis for withholding information or materials, specifically identify the privilege asserted and identify all information or material for which Muchisky alleges the privilege and provide all information responsive to the Interrogatory which is not subject to the asserted privilege including, but not

limited to, the author of the information, the recipient(s) of the information, the type of information or document, the date of the information and the number of pages.

INTERROGATORIES

INTERROGATORY NO. 1:

(A) Provide the date and describe the circumstances of Muchisky's consideration, selection, adoption and first use of the design mark in U.S. Trademark Serial No. 78/282,661.

(B) Identify each person having knowledge or information relating to Muchisky's consideration, selection, adoption, and/or first use of the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 2:

If the date of first use provided in response to Interrogatory No. 1(A) is later than January 1, 1966, provide the name of the individual or entity that had used the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 prior to Muchisky.

RESPONSE:

INTERROGATORY NO. 3:

If the date of first use provided in response to Interrogatory No. 1(A) is later than January 1, 1966, state whether the individual or entity had considered other designs as alternatives to the configuration of the applicator for a hand-held massager as illustrated

as the design mark in U.S. Trademark Serial No. 78/282,661, the number of designs that were considered as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and the reasons why the design of applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 was selected over the previously mentioned designs.

RESPONSE:

INTERROGATORY NO. 4:

If the date of first use provided in response to Interrogatory No. 1(A) is later than January 1, 1966, describe in detail how Muchisky acquired the rights to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 prior to the date provided in response to Interrogatory No. 1(A).

RESPONSE:

INTERROGATORY NO. 5:

Identify Muchisky's intended use of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 6:

Identify other designs that Muchisky considered as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 7:

With respect to each design identified in the answer to interrogatory 6, describe in detail the facts considered in selecting the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 over the designs identified in the response to interrogatory 6.

RESPONSE:

INTERROGATORY NO. 8:

Identify any licenses, whether written or oral, that Applicant has given to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 in commerce.

RESPONSE:

INTERROGATORY NO. 9:

Identify each of Applicant's competitors referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 10:

With respect to each of Applicant's competitors referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, identify by tradename, model number or any other identifier, the applicators that perform the same intended function of the a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and disclosed in response to Interrogatory No. 5 and disclosed in the specimen submitted with the application for U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 11:

Identify all trademarks that have been or are being placed on applicators or associated packaging having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 that were used or sold in commerce and the owner of the trademark.

RESPONSE:

INTERROGATORY NO. 12:

Identify the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 13:

If the source of Exhibit A identified in response to Interrogatory No. 12 is not the Applicant, identify the steps taken to inform the United States Patent and Trademark Office that the source of the specimen was an entity other than Applicant.

RESPONSE:

INTERROGATORY NO. 14:

If the source of Exhibit A identified in response to Interrogatory No. 12 is not the Applicant, provide the facts as to why Applicant represented to the United States Patent and Trademark Office that Applicant was the source of Exhibit A.

RESPONSE:

INTERROGATORY NO. 15:

Identify the total annual sales by Applicant, an individual, of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 from 2000 to the present.

RESPONSE:

INTERROGATORY NO. 16:

If the response to Interrogatory No. 15 for any year from 2000 to the present is less than the amount disclosed in the in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, provide the factual basis for making the representation regarding annual sales of the applicator at issue to the United States Patent and Trademark Office.

RESPONSE:

INTERROGATORY NO. 17:

Identify the total annual advertising expenditures by Applicant, an individual, promoting the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 from 2000 to the present.

RESPONSE:

INTERROGATORY NO. 18:

If the response to Interrogatory No. 17 identifies an amount, for any year requested, that is less than the amount disclosed in the in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, provide all bases for making the representation regarding annual advertising expenditures promoting the applicator at issue to the United States Patent and Trademark Office.

RESPONSE:

INTERROGATORY NO. 19:

Identify the listed owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 20:

If the owner of the French Trademark Registration identified in response to Interrogatory No. 19 is not the Applicant, identify the steps taken to inform the United States Patent and Trademark Office that the owner of the French Trademark Registration was an entity other than Applicant.

RESPONSE:

INTERROGATORY NO. 21:

If the owner of the French Trademark Registration identified in response to Interrogatory No. 19 is not the Applicant, provide the facts as to why Applicant represented to the United States Patent and Trademark Office that Applicant was the owner of the French Trademark Registration.

RESPONSE:

INTERROGATORY NO. 22:

Please identify each person Muchisky has retained or specially employed to provide expert testimony in the case. In doing so, please state all opinions to be expressed

and the basis and reasons therefor, set forth the data or other information considered by the witness in forming the opinions, and identify any exhibits to be used as a summary of or support for the opinions.

RESPONSE:

INTERROGATORY NO. 23:

Identify other configurations for an applicator that perform the function as described in both response to Interrogatory No. 5 and in the description of the applicator submitted with the specimen submitted with the application for U.S. Trademark Serial No. 78/282,661.

RESPONSE:

INTERROGATORY NO. 24:

Describe in detail why the tip of the applicator is specified as being firm rubber in the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and how a firm rubber tip is an identifier of a source of goods.

RESPONSE:

INTERROGATORY NO. 25:

Please identify all documents upon which Muchisky relied upon in answering these Interrogatories, and identify the custodian(s) of such documents.

RESPONSE:

INTERROGATORY NO. 26:

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 24 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

RESPONSE:

INTERROGATORY NO. 27:

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 25 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

RESPONSE:

INTERROGATORY NO. 28:

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 26 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

RESPONSE:

INTERROGATORY NO. 29:

Identify the persons who participated in compiling the information used to prepare Muchisky's answers and the persons most knowledgeable on behalf of Muchisky regarding the subject matter of the Interrogatory answers.

RESPONSE:

INTERROGATORY NO. 30:

Identify the persons who participated in identifying and compiling the documents produced by Muchisky and the persons most knowledgeable on behalf of Muchisky regarding the subject matter of the documents produced.

RESPONSE:

Respectfully submitted,

WESTMAN, CHAMPLIN & KELLY, P.A.

Dated: October 24, 2005

By: 

Nickolas E. Westman

Peter J. Ims

WESTMAN, CHAMPLIN & KELLY, P.A.

Suite 1400 – International Centre

900 Second Avenue South

Minneapolis, MN 55402-3319

Phone: (612) 334-3222

Fax: (612) 334-3312

**ATTORNEYS FOR OPPOSER
SYBARITIC, INC.**

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.,)	
)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
v.)	
)	
THOMAS P. MUCHISKY,)	
)	
Applicant.)	

**THOMAS P. MUCHISKY'S RESPONSES TO
SYBARITIC, INC.'S FIRST REQUESTS FOR ADMISSION**

All of Thomas P. Muchisky's (hereinafter "Muchisky") answers herein are subject to the following general objections, in addition to any and all specific objections that may be stated in response to each individual interrogatory.

1. Muchisky objects to each Request to the extent that it could be construed as encompassing communications or documents protected by any privilege, including but not limited to: (i) the attorney-client privilege; (ii) the attorney work product doctrine/privilege; or (iii) any other privilege or protection afforded by law. Muchisky and his counsel hereby assert such privileges and immunities.

2. Muchisky objects to each Request to the extent it seeks to impose on Muchisky obligations beyond those imposed by the Federal Rules of Civil Procedure.

3. Muchisky objects to each Request to the extent it is argumentative and/or calls upon Muchisky to interpret legal theories or to draw legal conclusions. If Opposer subsequently asserts or prevails on an interpretation of any Request that differs from that of Muchisky, Muchisky reserves the right to supplement, and/or modify his objections.

4. Muchisky objects to each Request on the ground that Opposer's definitions are overly broad, unduly burdensome, vague, and seek admissions beyond the scope of this Opposition.

5. Muchisky objects to these Requests to the extent that they are overly broad and unduly burdensome in that they purport to request admissions with respect to documents and things unrelated to the instant Opposition in both time and subject matter.

6. Muchisky objects to these Requests to the extent that they seek admissions with respect to information that is confidential and/or proprietary, without the benefit of a protective order.

7. Muchisky expressly reserves the right to object to further discovery and to the subject matter of such request and to the introduction into evidence of any document, thing, information or portion thereof.

8. Muchisky objects to each Request to the extent it calls for argumentative or speculative answers.

COMES NOW THOMAS P. MUCHISKY (hereinafter "Muchisky"), by and through his undersigned attorneys, subject to the above general objections and additional specific objections set forth below, in response to Sybaritic, Inc.'s First Requests for Admission (Nos. 1 – 28) states as follows

RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Muchisky is not the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. To the extent understood, denied.

REQUEST FOR ADMISSION NO. 2:

Muchisky represented to the United States Patent and Trademark Office that Muchisky was the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Objection, document speaks for itself. To the extent understood, admitted.

REQUEST FOR ADMISSION NO. 3:

Muchisky took no steps to inform the United States Patent and Trademark Office that Muchisky was not the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Objection, assumes facts not in evidence. Objection as calling for a legal conclusion that "steps" were required, which they were not. No Answer required.

REQUEST FOR ADMISSION NO. 4:

Muchisky, as an individual, has made no sales of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark

in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. To the extent understood, and under the provisions of the Lanham Act, denied.

REQUEST FOR ADMISSION NO. 5:

Muchisky, as an individual, has not incurred any advertising expenses promoting applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. To the extent understood, and under the provisions of the Lanham Act, denied.

REQUEST FOR ADMISSION NO. 6:

Other entities besides Muchisky and/or Muchisky's related entities have placed trademarks on applicators or associated packaging for the applicators having the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Objection, calls for a legal conclusion. Objection, assumes facts not in evidence. Objection, unlimited in time and scope. No answer required.

REQUEST FOR ADMISSION NO. 7:

Muchisky is not the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was

filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Objection, document speaks for it self. No answer required.

REQUEST FOR ADMISSION NO. 8:

Muchisky represented to the United States Patent and Trademark Office that Muchisky was the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Objection, calls for a legal conclusion. Objection, assumes facts not in evidence. Objection, document speaks for it self. No answer required.

REQUEST FOR ADMISSION NO. 9:

Muchisky took no steps to inform the United States Patent and Trademark Office that Muchisky was not the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Objection, assumes facts not in evidence. Objection as calling for a legal conclusion that "steps"

were required, which they were not. No Answer required.

REQUEST FOR ADMISSION NO. 10:

Muchisky and/or an agent of Muchisky contacted Norris Enterprises which resulted in a letter being sent to Muchisky or an agent of Muchisky that was submitted as Exhibit C along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for information that is available to Opposer by other means. Objection, calls for speculation. Objection, assumes facts not in evidence. Objection, irrelevant to present opposition. Objection, vague and indefinite. No answer required.

REQUEST FOR ADMISSION NO. 11:

The letter that was submitted as Exhibit C along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 does not state that the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is an identifier of the source of the goods.

RESPONSE: Objection, document speaks for itself. No answer required

REQUEST FOR ADMISSION NO. 12:

Muchisky and/or an agent of Muchisky contacted Cynthia Edwards or an agent of

Cynthia Edwards which resulted in a letter being sent to Muchisky or an agent of Muchisky that was submitted as Exhibit D along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for information that is available to Opposer by other means. Objection, calls for speculation. Objection, assumes facts not in evidence. Objection, irrelevant to present opposition. Objection, vague and indefinite. No answer required.

REQUEST FOR ADMISSION NO. 13:

The letter that was submitted as Exhibit D along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 does not state that the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is an identifier of the source of the goods.

RESPONSE: Objection, document speaks for itself. No answer required.

REQUEST FOR ADMISSION NO. 14:

In Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, Applicant stated that there are "numerous applicators which provide virtually the identical functions" to the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No.

78/282,661.

RESPONSE: Objection, document speaks for itself. No answer required.

REQUEST FOR ADMISSION NO. 15:

In Applicant's specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to reduce trigger points; for all varieties of pressure techniques, and; wherever the thumb would normally be used in muscle goading techniques.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Virtually every product is a combination of functional and non-functional features. To the extent this Request attempts to mimic advertisements in the file history, the documents there speak for themselves. No answer required.

REQUEST FOR ADMISSION NO. 16:

The rounded tip of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to simulate the surface of a thumb.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Virtually every product is a combination of functional and non-functional features. To the extent this Request attempts to mimic advertisements in the file history, the documents there speak for themselves. No answer required.

REQUEST FOR ADMISSION NO. 17:

The rounded tip of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to simulate the pressure applied to a body by a thumb.

RESPONSE: Objection, vague, indefinite and incapable of understanding. Virtually every product is a combination of functional and non-functional features. To the extent this Request attempts to mimic advertisements in the file history, the documents there speak for themselves. No answer required.

REQUEST FOR ADMISSION NO. 18:

An applicator, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, would not perform the stated functions without a rounded tip.

RESPONSE: A competent designer could design any number of configurations not similar to the overall configuration shown in the mark for which registration is sought in the referenced application without utilizing the configuration shown in the application. Denied.

REQUEST FOR ADMISSION NO. 19:

Applicant is aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a rounded tip.

RESPONSE: To the extent that applicant is aware of applicators that will provide a similar massage effect but have a configuration different from the configuration shown in the referenced application, admitted.

REQUEST FOR ADMISSION NO. 20:

Applicant is aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a cone shaped portion attached to the rounded tip.

RESPONSE: To the extent that applicant is aware of applicators that will provide a similar massage effect but that have a configuration different from the configuration shown in the referenced application, admitted.

REQUEST FOR ADMISSION NO. 21:

On or before June 16, 2004, Applicant was aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a rounded tip.

RESPONSE: To the extent that applicant is aware of applicators that will provide a similar massage effect but have a configuration different from the configuration shown in the referenced application, admitted, but applicant believes he is entitled to use such mark in commerce and to the best of his knowledge and belief, no other person, firm, corporation or association has the right in commerce either in identical form thereof or in

such near resemblance thereto, to employ the configuration of the reference application so as to be likely to cause confusion or to cause mistake or to deceive.

REQUEST FOR ADMISSION NO. 22:

On or before June 16, 2004, Applicant was aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a cone shaped portion attached to the rounded tip.

RESPONSE: To the extent that applicant is aware of applicators that will provide a similar massage effect but have a configuration different from the configuration shown in the referenced application, admitted, but applicant believes he is entitled to use the mark of the referenced application in commerce and to the best of his knowledge and belief, no other person, firm, corporation or association has the right in commerce either in identical form thereof or in such near resemblance thereto to employ the configuration of the reference application so as to be likely to cause confusion or to cause mistake or to deceive.

REQUEST FOR ADMISSION NO. 23:

In Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, Applicant stated: "There are various hand-held massagers using different applicators, as shown by the attached literature. None of these massagers are identical or even substantially similar to Applicant's particular configuration. These alternative designs are equally efficient and competitive." which were made in reference to third

party's applicators, that perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, the document speaks for itself. No answer required.

REQUEST FOR ADMISSION NO. 24:

Applicant did not attach any literature in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 as referenced in Request for Admission No. 21.

RESPONSE: Objection, vague and indefinite. Applicant clearly intended to attach literature. If the literature was not attached, no objection was made to the amendment filed June 16, 2004 by the Examiner in charge of the application. Applicant therefore is without information sufficient to admit or deny Request 24.

REQUEST FOR ADMISSION NO. 25:

Applicant did not attach any literature in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 illustrating third party alternative designs to an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague and indefinite. Applicant clearly intended to attach literature. If the literature was not attached, no objection was made to the amendment

filed June 16, 2004 by the Examiner in charge of the application. Applicant therefore is without information sufficient to admit or deny Request 25.

REQUEST FOR ADMISSION NO. 26:

On or before June 16, 2004, Muchisky was not aware of a third party's alternative configuration for an applicator that was designed to perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of comprehension. To the extent understood, Denied.

REQUEST FOR ADMISSION NO. 27:

On or before June 16, 2004, Muchisky did not have in his possession, custody or control any literature of a third party's alternative configuration for an applicator that was designed to perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and incapable of comprehension. To the extent understood, Denied.

REQUEST FOR ADMISSION NO. 28:

Muchisky, through a licensing agreement or other agreement, allowed at least one third party to place the third party's trademark on an applicator having the configuration

Exhibit 4
Page 14 of 15

of the applicator for a hand-held massager as illustrated as the design mark in U.S.

Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague and indefinite as to time and place. Objection as to any inference that such agreement, if any, was in anyway inconsistent with the provisions of the Lanham Act. Applicant is without information sufficient to either admit or deny the request, and therefore denies the same.

Respectfully submitted,

By: Lionel L. Lucchesi
Lionel L. Lucchesi, 25,891
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131
(314) 238-2400 Phone
(314) 238-2401 Fax

Attorneys for Applicant
Thomas P. Muchisky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of THOMAS P. MUCHISKY'S RESPONSES TO SYBARITIC, INC.'S FIRST REQUESTS FOR ADMISSION is being served via first class U. S. Mail, postage prepaid, this 28th day of November, 2005, upon the following:

Nickolas E. Westman, Esq.
Peter J. Ims, Esq.
Westman, Champlin & Kelly, P.A.
900 Second Avenue South, Suite 1400
International Centre
Minneapolis, MN 55402

Attorneys for Opposer
Sybaritic, Inc.

Nora Schomay

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.,)	
)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
v.)	
)	
THOMAS P. MUCHISKY,)	
)	
Applicant.)	

**THOMAS P. MUCHISKY'S ANSWERS TO
SYBARITIC, INC.'S FIRST SET OF INTERROGATORIES**

COMES NOW THOMAS P. MUCHISKY (hereinafter "Muchisky"), by and through his undersigned attorneys, and in response to Sybaritic, Inc.'s First Set of Interrogatories to Thomas P. Muchisky (Nos. 1 - 30) states as follows:

GENERAL OBJECTIONS.

All of Thomas P. Muchisky's (hereinafter "Muchisky") answers herein are subject to the following general objections, in addition to any and all specific objections that may be stated in response to each individual interrogatory.

1. Muchisky objects to each Interrogatory to the extent that it could be construed as encompassing communications or documents protected by any privilege, including but not limited to: (i) the attorney-client privilege; (ii) the attorney work product doctrine/privilege; or (iii) any other privilege or protection afforded by law. Muchisky and his counsel hereby assert such privileges and immunities.

2. Muchisky objects to each Interrogatory to the extent it seeks to impose on Muchisky obligations beyond those imposed by the Federal Rules of Civil Procedure.

3. Muchisky objects to each Interrogatory to the extent that the information or documents requested therein are not within Muchisky's possession, custody or control.

4. Muchisky objects to each Interrogatory to the extent it is argumentative and/or calls upon Muchisky to interpret legal theories or to draw legal conclusions. If Opposer subsequently asserts or prevails on an interpretation of any Interrogatory that differs from that of Muchisky, Muchisky reserves the right to supplement and/or modify his objections.

5. Muchisky objects to these Interrogatories to the extent that they seek information that is neither relevant to the subject matter of this Opposition nor reasonably calculated to lead to the discovery of admissible evidence.

6. Muchisky objects to each Interrogatory on the ground that Opposer's definitions are overly broad, unduly burdensome, vague, and seek information beyond the scope of this Opposition.

7. Muchisky objects to these interrogatories to the extent that they are overly broad and unduly burdensome in that they request the identification of documents and things unrelated to the instant Opposition in both time and subject matter.

8. Muchisky objects to these Interrogatories to the extent that they seek information that is confidential and/or proprietary, without the benefit of a protective order.

9. Muchisky expressly reserves the right to object to further discovery and to the subject matter of such request and to the introduction into evidence of any document, thing, information or portion thereof.

10. Muchisky objects to each interrogatory to the extent it seeks information

that Muchisky considers to be confidential or secret until such time as an appropriate Protective Order is entered by the Trademark Trial and Appeal Board.

11. Muchisky objects to each interrogatory to the extent it calls for argumentative or speculative answers.

13. Muchisky objects to each interrogatory to the extent it seeks information which is obtainable from some other source that is more convenient, less burdensome and/or less expensive.

14. Muchisky objects to each interrogatory to the extent it is unreasonably cumulative or duplicative, vague or ambiguous, and/or otherwise unduly burdensome or oppressive.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1:

(A) Provide the date and describe the circumstances of Muchisky's consideration, selection, adoption and first use of the design mark in U.S. Trademark Serial No. 78/282,661.

(B) Identify each person having knowledge or information relating to Muchisky's consideration, selection, adoption, and/or first use of the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: (A) Applicant's first use of the design mark in application Serial No. 78/282,661 occurred at least as early as 1965 as stated in the application.

(B) Objection: overly broad, irrelevant, and not reasonably calculated to lead to the discovery of relevant evidence. The general and specific objections notwithstanding, to the extent presently identified, Tom Muchisky.

INTERROGATORY NO. 2:

If the date of first use provided in response to Interrogatory No. I(A) is later than January 1, 1966, provide the name of the individual or entity that had used the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 prior to Muchisky.

RESPONSE: See answer to Interrogatory No. 1. Objection, assumes facts not in evidence. Objection, not relevant to any issue in this opposition, in that Opposer has not shown it has rights superior to Applicant. Subject to the general and specific objections,

no answer required.

INTERROGATORY NO. 3:

If the date of first use provided in response to Interrogatory No. I(A) is later than January 1, 1966, state whether the individual or entity had considered other designs as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661, the number of designs that were considered as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and the reasons why the design of applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 was selected over the previously mentioned designs.

RESPONSE: See answer to Interrogatory 2.

INTERROGATORY NO. 4:

If the date of first use provided in response to Interrogatory No. 1 (A) is later than January 1, 1966, describe in detail how Muchisky acquired the rights to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 prior to the date provided in response to Interrogatory No. I(A).

RESPONSE: See Answer to Interrogatory 2.

INTERROGATORY NO. 5:

Identify Muchisky's intended use of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite with respect to time. Objection, not likely to lead to the discovery of admissible evidence. Subject to the general and specific objections, at least one intended use was as an identifier as to source.

INTERROGATORY NO. 6:

Identify other designs that Muchisky considered as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection: irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the general and specific objections, no answer required.

INTERROGATORY NO. 7:

With respect to each design identified in the answer to interrogatory 6, describe in detail the facts considered in selecting the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 over the designs identified in the response to interrogatory 6.

RESPONSE: See answer to Interrogatory 6.

INTERROGATORY NO. 8:

Identify any licenses, whether written or oral, that Applicant has given to use the

configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 in commerce.

RESPONSE: Objection, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Objection, calls for confidential information that will only be provided, if any exists, in accordance with a suitable protective order entered by the Board.

INTERROGATORY NO. 9:

Identify each of Applicant's competitors referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for information that is available to opposer by other means. Objection, not reasonably calculated to lead to the discovery of relevant evidence. Subject to the general and specific objections, no answer required.

INTERROGATORY NO. 10:

With respect to each of Applicant's competitors referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, identify by tradename, model number or any other identifier, the applicators that perform the same intended function of the a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and disclosed in response to Interrogatory No. 5 and disclosed in the specimen submitted with the application for U.S. Trademark Serial

No. 78/282,661.

RESPONSE: Objection, calls for information that is available to opposer by other means. Objection, not reasonably calculated to lead to the discovery of relevant evidence. Subject to the general and specific objections, no answer required.

INTERROGATORY NO. 11:

Identify all trademarks that have been or are being placed on applicators or associated packaging having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 that were used or sold in commerce and the owner of the trademark.

RESPONSE: Objection, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Objection, overbroad, vague and indefinite so as to be incomprehensible. Subject to the general and specific objections, no answer required.

INTERROGATORY NO. 12:

Identify the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Applicant's Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague and indefinite so as to be incomprehensible. Objection, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 13:

If the source of Exhibit A identified in response to Interrogatory No. 12 is not the Applicant, identify the steps taken to inform the United States Patent and Trademark Office that the source of the specimen was an entity other than Applicant.

RESPONSE: See answer to Interrogatory No. 12.

INTERROGATORY NO. 14:

If the source of Exhibit A identified in response to Interrogatory No. 12 is not the Applicant, provide the facts as to why Applicant represented to the United States Patent and Trademark Office that Applicant was the source of Exhibit A.

RESPONSE: See answer to Interrogatory No. 12.

INTERROGATORY NO. 15:

Identify the total annual sales by Applicant, an individual, of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 from 2000 to the present.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, calls for confidential information that may be provided only in accordance with a suitable protective order entered by the Board. Objection, improperly asserts legal theories. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 16:

If the response to Interrogatory No. 15 for any year from 2000 to the present is

less than the amount disclosed in the in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, provide the factual basis for making the representation regarding annual sales of the applicator at issue to the United States Patent and Trademark Office.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, calls for confidential information that may be provided only in accordance with a suitable protective order entered by the Board. Objection, improperly asserts legal theories. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 17:

Identify the total annual advertising expenditures by Applicant, an individual, promoting the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 from 2000 to the present.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, calls for confidential information that may be provided only in accordance with a suitable protective order entered by the Board. Objection, improperly asserts legal theories. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 18:

If the response to Interrogatory No. 17 identifies an amount, for any year

requested, that is less than the amount disclosed in the in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, provide all bases for making the representation regarding annual advertising expenditures promoting the applicator at issue to the United States Patent and Trademark Office.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, calls for confidential information that may be provided only in accordance with a suitable protective order entered by the Board. Objection, improperly asserts legal theories. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 19:

Identify the listed owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, foreign registration is irrelevant to this opposition and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the general and specific objections, no answer required.

INTERROGATORY NO. 20:

If the owner of the French Trademark Registration identified in response to

Interrogatory No. 19 is not the Applicant, identify the steps taken to inform the United States Patent and Trademark Office that the owner of the French Trademark Registration was an entity other than Applicant.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, foreign registration is irrelevant to this opposition and not reasonably calculated to lead to the discovery of admissible evidence. Objection, improperly asserts legal theories and assumes facts not in evidence. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 21:

If the owner of the French Trademark Registration identified in response to Interrogatory No. 19 is not the Applicant, provide the facts as to why Applicant represented to the United States Patent and Trademark Office that Applicant was the owner of the French Trademark Registration.

RESPONSE: Objection, vague, indefinite and not likely to lead to the discovery of admissible evidence. Objection, foreign registration is irrelevant to this opposition and not reasonably calculated to lead to the discovery of admissible evidence. Objection, improperly asserts legal theories and assumes facts not in evidence. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 22:

Please identify each person Muchisky has retained or specially employed to provide expert testimony in the case. In doing so, please state all opinions to be expressed

and the basis and reasons therefor, set forth the data or other information considered by the witness in forming the opinions, and identify any exhibits to be used as a summary of or support for the opinions.

RESPONSE: Objection, calls for attorney client privilege or attorney work product information. Subject to the general and specific objections, Applicant has not yet identified an expert. This interrogatory will be updated in accordance with Rule 26, Fed. R. Civ. Pro.

INTERROGATORY NO. 23:

Identify other configurations for an applicator that perform the function as described in both response to Interrogatory No. 5 and in the description of the applicator submitted with the specimen submitted with the application for U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection: calls for information that is available to Opposer by other means, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to the general and specific objections, no answer required.

INTERROGATORY NO. 24:

Describe in detail why the tip of the applicator is specified as being firm rubber in the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and how a firm rubber tip is an identifier of a source of goods.

RESPONSE: Objection, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Objection, assumes facts not in evidence. Objection, improperly asserts legal theories. Subject to the general and specific objections, Opposer's attention is directed to the TMEP.

INTERROGATORY NO. 25:

Please identify all documents upon which Muchisky relied upon in answering these Interrogatories, and identify the custodian(s) of such documents.

RESPONSE: The general objections are incorporated herein. Subject to those objections, Applicant has no non-privileged documents in his possession, custody or control responsive to this Interrogatory.

INTERROGATORY NO. 26:

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 24 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

RESPONSE: The general objections are incorporated herein by reference. Subject to objection, Applicant states that his investigation is ongoing, but to date, the following individuals have been identified:

Mr. Thomas Muchisky
13250 Lakefront Drive
Earth City, Missouri 63045

James Young, President
XG-AD
2119 Olive Street
St. Louis, Missouri 63103

Margaux Turner
451 Leslie Drive
Port Orange, Florida 32127

Cynthia Edwards (address presently not available)

Steve Daffer (adverse, has information showing that other designs for a number of applicator designs are available if one does not just want to copy another's rights)

Jacque Scrimali (adverse, has information showing that other designs for a number of applicator designs are available if one does not just want to copy another's rights)

Jean-Luc Bes (Bordeaux France)

Jeff Robertson
13250 Lakefront Drive
Earth City Missouri, 63045

Kim Perry
2081 N. Webb Rd.
Wichita, KS 67206

With the exception of the adverse witness, the other witnesses have knowledge supporting paragraph 24 of Applicants' Answer to Amended Notice of Opposition,

INTERROGATORY NO. 27:

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 25 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified,

describe in detail the substance of his or her knowledge.

RESPONSE: See Answer to Interrogatory No. 26.

INTERROGATORY NO. 28:

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 26 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

RESPONSE: See Answer to Interrogatory No.26.

INTERROGATORY NO. 29:

Identify the persons who participated in compiling the information used to prepare Muchisky's answers and the persons most knowledgeable on behalf of Muchisky regarding the subject matter of the Interrogatory answers.

RESPONSE: Objection, calls for attorney client privilege and/or attorney work product information. Subject to the general and specific objection, no answer required.

INTERROGATORY NO. 30:

Identify the persons who participated in identifying and compiling the documents produced by Muchisky and the persons most knowledgeable on behalf of Muchisky regarding the subject matter of the documents produced.

RESPONSE: See answer to Interrogatory No. 29.

Exhibit 5
Page 17 of 19

As to Objections:

By: Lionel L. Lucchesi
Lionel L. Lucchesi, 25,891
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131
(314) 238-2400 Phone
(314) 238-2401 Fax

Attorneys for Applicant
Thomas P. Muchisky

Exhibit 5
Page 18 of 19

DECLARATION

I declare under penalty of perjury that the foregoing is true and
correct.

Date: NOV. 28, 2005

By: Thomas P. Muchisky
Thomas P. Muchisky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of THOMAS P. MUCHISKY'S ANSWERS TO SYBARITIC, INC.'S FIRST SET OF INTERROGATORIES is being served via first class U. S. Mail, postage prepaid, this 28th day of November, 2005, upon the following:

Nickolas E. Westman, Esq.
Peter J. Ims, Esq.
Westman, Champlin & Kelly, P.A.
900 Second Avenue South, Suite 1400
International Centre
Minneapolis, MN 55402

Attorneys for Opposer
Sybaritic, Inc.

Nora Schomogy

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.,)	
)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
v.)	
)	
THOMAS P. MUCHISKY,)	
)	
Applicant.)	

**THOMAS P. MUCHISKY'S RESPONSES TO
SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION
OF DOCUMENTS AND THINGS (NOS. 1 -19)**

COMES NOW THOMAS P. MUCHISKY (hereinafter "Muchisky"), by and through his undersigned attorneys, and in response to Sybaritic, Inc.'s First Set of Request for Production of Documents and Things (Nos. 1 – 19) states as follows:

GENERAL OBJECTIONS

1. Muchisky objects to each Request to the extent that it could be construed as encompassing communications or documents protected by any privilege, including but not limited to: (i) the attorney-client privilege; (ii) the attorney work product doctrine/privilege; or (iii) any other privilege or protection afforded by law. Muchisky and his counsel hereby assert such privileges and immunities.

2. Muchisky objects to each Request to the extent it seeks to impose on Muchisky obligations beyond those imposed by the Federal Rules of Civil Procedure.

3. Muchisky objects to each Request to the extent that the information or documents requested therein are not within Muchisky's possession, custody or control.

4. Muchisky objects to each Request to the extent it is argumentative and/or calls upon Muchisky to interpret legal theories or to draw legal conclusions. If Opposer

subsequently asserts or prevails on an interpretation of any Request that differs from that of Muchisky, Muchisky reserves the right to supplement and/or modify his objections.

5. Muchisky objects to these Requests to the extent that they seek information that is neither relevant to the subject matter of this Opposition nor reasonably calculated to lead to the discovery of admissible evidence.

6. Muchisky objects to each Request on the ground that Opposer's definitions are overly broad, unduly burdensome, vague, and seek information beyond the scope of this Opposition and/or require Muchisky to provide documents and things outside the scope of Rule 26(b) of the Federal Rules of Civil Procedure.

7. Muchisky expressly reserves the right to object to further discovery and to the subject matter of such Request and to the introduction into evidence of any document, thing, information or portion thereof.

8. Muchisky objects to the requests for production to the extent that they call for the production of documents and things that Muchisky considers to be confidential or secret, which will be produced only under the restrictions of a Protective Order entered by the Trademark Trial and Appeal Board.

RESPONSES TO DOCUMENTS REQUESTED

REQUEST NO. 1:

Specimens of each label, brochure, display, catalog, advertisement or any other publicly disseminated information ever used by Muchisky in connection with the use, sale, offer for sale, or distribution of goods or services in conjunction with the configuration of the applicator for a hand-held massager as illustrated as the design mark

in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection: unduly burdensome and oppressive, and not reasonably calculated to lead to the discovery of admissible evidence. Objection, unlimited as to time. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant directs Opposer's attention to www.g5.com, a web cite, on information and belief well known to Opposer.

REQUEST NO. 2:

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 3:

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of an alternative design identified in the responses to Interrogatory Nos.: 3 and 6 to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 4:

All documents referring or relating to marketing studies, focus group studies, polls or surveys conducted by or caused to be conducted or obtained for Muchisky that relate to the selection, adoption and/or acquisition of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 5:

All documents referring or relating to the marketing, distribution, sale, advertising, or promotion by Muchisky of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without

waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 6:

All documents referring or relating to any person, owner or any other entity having or having had any right to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 including, but not limited to licensing agreements, through or under which Muchisky claims any rights in such alleged mark.

RESPONSE: Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 7:

All documents referring or relating to administrative proceeding, legal opinion or civil each complaint, objection, opposition, action involving Muchisky's use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and

incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 8:

All documents summarizing or memorializing Muchisky's sales of applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 commencing with the date of first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer

REQUEST NO. 9:

All documents referring or relating to Sybaritic's making, using and/or selling of an applicator having the exact configuration or a similar configuration to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and

incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer

REQUEST NO. 10:

All documents that support Muckisky's statements set forth in Muchisky's Answer to Amended Notice of Opposition.

RESPONSE: Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 11:

All documents that discuss materials of construction of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection, Applicant restates and incorporates the general objections. Objection, requests confidential business information that will only be provided, if available, under a suitable protective order entered by the Board. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his

possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer

REQUEST NO. 12:

All documents that discuss a cone shape as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, vague and indefinite. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, requests confidential business information that will only be provided, if available, under a suitable protective order entered by the Board. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 13:

All documents that discuss a rounded tip as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE: Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by

attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 14:

All documents referring to or relating to a third party's use of an applicator having the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

RESPONSE: Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 15:

All documents referring to or relating to a third party's use of an applicator designed to perform the same functions as stated in response to Interrogatory No. 5 that does not have a configuration the same as or similar to the applicator for a hand-held

massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

RESPONSE: Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer. To the extent not already in the possession of Opposer or available to Opposer from other sources, and without waving any objections, Applicant will produce relevant, non – privileged documents responsive to this Request.

REQUEST NO. 16:

All documents that were or should have been identified in response to Sybaritic's Interrogatories in this Opposition Proceeding.

RESPONSE: Objection, vague, indefinite and incapable of answer. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged

documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 17:

For each of Sybaritic's Interrogatories in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's answers.

RESPONSE: Objection, vague, indefinite and incapable of answer. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 18:

For each of Sybaritic's Document Requests in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's responses.

RESPONSE: Objection, vague, indefinite and incapable of answer. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection:

**Exhibit 6
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request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

REQUEST NO. 19:

All document that were identified or referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE: Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer. To the extent not already in the possession of Opposer or available to Opposer from other sources, and without waving any objections, Applicant will produce relevant, non - privileged documents responsive to this Request.

Respectfully submitted,

By: Lionel L. Lucchesi
Lionel L. Lucchesi, 25,891
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131
(314) 238-2400 Phone
(314) 238-2401 Fax

Attorneys for Applicant
Thomas P. Muchisky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of THOMAS P. MUCHISKY'S RESPONSES TO SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS (NOS. 1-19) is being served via first class U. S. Mail, postage prepaid, this 28th day of November, 2005, upon the following:

Nickolas E. Westman, Esq.
Peter J. Ims, Esq.
Westman, Champlin & Kelly, P.A.
900 Second Avenue South, Suite 1400
International Centre
Minneapolis, MN 55402

Attorneys for Opposer
Sybaritic, Inc.

Nora Schomogy

LEWIS, RICE & FINGERSH, L.C.

ATTORNEYS AT LAW

FRANK B. JANOSKI
DIRECT TEL (314) 444-1307
DIRECT FAX (314) 612-1307

500 N. BROADWAY, SUITE 2000
ST. LOUIS, MISSOURI 63102-2147
WWW.LRF.COM
FJANOSKI@LEWISRICE.COM

TEL (314) 444-7600
FAX (314) 444-7788

January 16, 2006

VIA FACSIMILE AND U.S. MAIL

Mr. Lionel L. Lucchesi
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, MO 63131-3615

**Re: Sybaritic, Inc. v. Thomas P. Muchisky
U.S. Patent & Trademark Office, Trademark Trial and Appeal Board
Opposition No. 91/163,999**

Dear Lou:

I write regarding Applicant Thomas P. Muchisky's discovery responses in the above-referenced matter. You will find below a listing of discovery responses that require supplementation. In light of the pending Motion for Summary Judgment, we require that your client supplement its responses as noted below no later than Wednesday, January 18, 2006. If I do not hear from you or your client is unwilling to supplement the responses and answers as requested, we will be required to file a Motion to Compel and/or a Rule 56(f) Motion for additional discovery.

Requests for Admission:

- Your client's "responses" to Request Nos. 3, 6 – 17, and 23 are completely non-responsive and/or evasive. Your client must either admit, deny or indicate why it has insufficient knowledge to admit or deny the Requests. Your client has failed to do so, and its responses to these Requests must therefore be supplemented.

Interrogatories:

- Your client's "answers" to Interrogatory Nos. 6 – 7, 9 – 14, 19 – 21, 23 – 24, and 29 – 30 are completely non-responsive and/or evasive. These Interrogatory answers must be supplemented.
- Your client has failed to answer Interrogatory Nos. 8, and 15 – 18 on the stated ground that the information sought is confidential and will only be provided in accordance with a

Mr. Lionel L. Lucchesi
January 16, 2006
Page 2

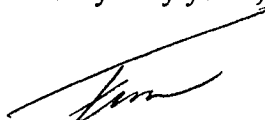
suitable protective order entered by the Board. Please provide us with a proposed protective order under which your client will agree to provide the requested information.

Requests for Production of Documents:

- Your client's "responses" to Request Nos. 1 – 14, 16 – 18 are completely non-responsive and/or evasive. For instance, indicating that the documents are already in our client's possession, custody or control without further specification is wholly unacceptable. These Responses must be supplemented and the requested documents must be produced.
- Your client has failed to provide documents requested in Request Nos. 11 – 12 on the stated ground that the information sought is confidential and will only be provided in accordance with a suitable protective order entered by the Board. However, you have already provided generalized sales and advertising figures to the Board without any protective order; you cannot rely on this information on the one hand and then refuse to produce the underlying documents on the other hand. Please provide us with a proposed protective order under which your client will agree to produce the requested documents.
- Your client indicated in its Responses to Request Nos. 15 and 19 that non-privileged documents responsive to the Requests would be produced. Please produce these documents immediately, or provide a date (prior to Thursday, January 19, 2006) on which they will be made available for inspection.

Thank you in advance for your attention. I will look forward to your prompt response. If I am not available, you can discuss these issues with either Michael Hickey or Bridget Hoy of this office.

Very truly yours,



Frank B. Janoski

FBJ/mb

cc: Michael J. Hickey
Bridget Hoy



Polster, Lieder, Woodruff & Lucchesi, L.C.

Patent ■ Trademark ■ Copyright ■ Trade Secret ■ Unfair Competition

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Lionel L. Lucchesi
llucchesi@patpro.com

January 18, 2006

Exhibit 8
Page 1 of 2

Mr. Frank Janoski
Lewis, Rice & Fingersh, L.C.
500 N. Broadway, Suite 2000
St. Louis, Missouri 63102-2147

VIA FACSIMILE AND REGULAR U.S. MAIL

Re: ***General Physiotherapy, Inc. v. Sybaritic, Inc. et al.***
U.S. Patent & Trademark Office, Trademark Trial & Appeal Board
Opposition No. 91/163,999
Our Ref.: PHYS L709

Dear Frank:

Thank you for your letter of January 16, 2006 in the above-referenced matter. Your letter came as quite a surprise, in view of your client's completely non-responsive answers to Mr. Muchisky's discovery requests. If nothing else, your client's actions, in various matters, between the parties, is predictable. The client does not respond, and then proceeds to accuse Mr. Muchisky of violation of the federal rules. We believe the board will quickly see through the tactic.

In specific response to your questions, we answer them in the manner you raise them.

The Request for Admissions are proper under the Federal Rules of Civil Procedure. You are not entitled to the answer you want.

Interrogatories, see response to Request for Admissions.

With respect to the proposed protective order, since you were plaintiff in the case, please provide us with an electronic copy and we will revise it to make it suitable from our client's perspective.

New Jersey Office:
Glen H. Books, Of Counsel
Managing Attorney of New Jersey Office
63 North Maple Avenue
Basking Ridge, New Jersey 07920
Telephone: 908.204.0128

Illinois Office:
2 Park Place Professional Centre
Belleville, Illinois 62226
Telephone: 618.257.3340

Exhibit 8
Page 2 of 2

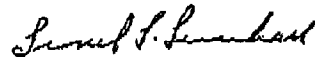
With respect to production of documents, see answer with respect to Request for Admissions.

You have been provided sales information in connection with other matters pending between our clients, if our request is that we recopy it and submit it to you again, please let me know.

With respect to your request 15 and 16, see the previous paragraph.

Please let me know if you have any questions. We consider the matter closed.

Very truly yours,



Lionel L. Lucchesi

LLU:cd
Enclosures

LEWIS, RICE & FINGERSH, L.C.

ATTORNEYS AT LAW

FRANK B. JANOSKI
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January 20, 2006

VIA FACSIMILE AND U.S. MAIL

Mr. Lionel L. Lucchesi
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, MO 63131-3615

**Re: Sybaritic, Inc. v. Thomas P. Muchisky
U.S. Patent & Trademark Office, Trademark Trial and Appeal Board
Opposition No. 91/163,999**

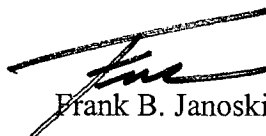
Dear Lou:

You will find enclosed the following:

- Opposer's Motion and Memorandum Seeking Additional Time Pursuant to Federal Rule 56(f) to Conduct Discovery; and
- a proposed protective order.

The protective order mirrors the protective order already agreed to by these same parties in the federal litigation that is currently pending. I trust that it will meet with your approval for this proceeding as well. If it is acceptable to you, please execute the document and forward a signed copy to me at your earliest convenience so that we can have it entered by the TTAB.

Very truly yours,



Frank B. Janoski

FBJ/mb

cc: Michael J. Hickey
Bridget Hoy

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.,)	
)	
Opposer,)	
)	
v.	)	Opposition No. 91/163,999
	)	Serial No. 78/282,661
THOMAS P. MUCHISKY,)	
)	
Applicant.)	

**STIPULATED PROTECTIVE ORDER
REGARDING CONFIDENTIALITY**

WHEREAS, discovery in the above-entitled action will involve the production of information, which the producing parties, or persons claim to be confidential information;

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, IT IS HEREBY STIPULATED AND AGREED by the parties through their respective counsel of record that:

1. In connection with discovery and other proceedings in this proceeding, the parties may designate in writing any document, thing, material, testimony, or other information derived therefrom (whether by document, by deposition testimony, by interrogatory answer, request to admit or in any Motion, pleading, affidavit, declaration, brief or other document submitted to the Trademark Trial and Appeal Board ("TTAB") or otherwise), as "Confidential" or "Confidential: Attorneys' Eyes Only" under the terms of this Protective Order (hereinafter "Order"). As a general guideline, any information which is publicly available, including any information which can be ascertained from the examination of a product sold by any party, should not be designated as "Confidential" or "Confidential: Attorneys' Eyes Only."

2. "Confidential" material is any so-designated document, thing, material, testimony, or other derived information that is, includes, or constitutes information which the producing party has a good faith basis for contending is confidential technical, scientific, commercial,

business or financial information, or information that is otherwise confidential to its business and must be protected against disclosure to unauthorized third parties.

3. Documents, things, or other tangible materials to be designated as "Confidential" shall be designated as such by stamping on each page of the copies of the document or thing produced to a party with the legend "CONFIDENTIAL," or by otherwise affixing to the document or thing produced a label with such designation. Where only portions of a document or interrogatory answer are claimed to be "Confidential," the producing party shall designate the parts of said materials for which confidentiality is claimed, and only those portions shall be subject to this Order. The failure of a party to designate in the first instance material as "Confidential" shall not preclude that party from subsequently designating the material as "Confidential."

4. Documents, things, or other tangible materials that the producing party claims relates to non-public trade secrets, highly confidential customer or business information, or similarly highly confidential and sensitive technical, scientific, commercial, business, or financial information, or future business or marketing plans or strategy which would put the producing person or entity at a competitive disadvantage if the information became known to the receiving party may be designated as "Confidential: Attorneys' Eyes Only." Such a designation shall be made in a manner similar to that set forth in Paragraph 3 above, except that the phrase "CONFIDENTIAL: ATTORNEYS' EYES ONLY" shall be stamped on or affixed to the material.

5. Testimony taken at a deposition, conference, hearing or trial may be designated as "Confidential" or "Confidential: Attorneys' Eyes Only" by a statement by an attorney of one of the parties to that effect on the record at the deposition or other proceeding, or by written notice to the opposing party within ten (10) business days of receipt of a transcript thereof. During this

ten (10) day period, counsel for the parties shall treat the entire transcript as if it had been designated "Confidential: Attorneys' Eyes Only." If a "Confidential" or "Confidential: Attorneys' Eyes Only" designation is made during the course of a deposition, counsel for a party or the witness may request all persons, except persons entitled to receive such information pursuant to this Order and the stenographer, to leave the room where the deposition or testimony is proceeding until completion of the answer or answers containing such confidential information and the reporter shall then separately transcribe those portions of the testimony so designated and shall mark the face, and if possible, each page of the transcript, with the appropriate designation and seal it in a separate envelope. The failure of a party to designate in the first instance testimony as "Confidential" or "Confidential: Attorneys' Eyes Only" shall not preclude that party from subsequently designating the testimony as "Confidential" or "Confidential: Attorneys' Eyes Only." The designation of testimony as "Confidential" or "Confidential: Attorneys' Eyes Only" may be "temporary," with such designation being removed by the designating party as the circumstances may thereafter dictate. Arrangements shall be made with the court reporter taking and transcribing such proceeding to separately bind such portions of the transcript containing information designated as "Confidential" or "Confidential: Attorneys' Eyes Only," and to label such portions appropriately.

6. Documents, things, material, testimony, or other derived information designated as "Confidential" or "Confidential: Attorneys' Eyes Only" under this Order, the information contained therein, and any summaries, copies, abstracts, or other documents derived in whole or in part from such material shall not be disclosed to anyone except as provided in this Order and shall be used only for the purpose of the prosecution, defense, or settlement of this action, and not for any business or other purpose whatever, unless under legal compulsion in connection with a court case or other governmental administrative proceeding. In such event, the party from

whom production is sought will promptly advise the designating party of such legal compulsion and both parties agree to cooperate in a good faith attempt to protect such material, be it through objections, motion to quash, protective order or otherwise.

7. "Confidential" material including any information contained in or derived from "Confidential" material, may be disclosed only to the following persons:

a. The Trademark Trial and Appeal Board and its personnel and any court to which an appeal in this proceeding might lie;

b. The outside counsel of record in this action, their associate attorneys, and employees of their firms whose functions require access to such material and who are assisting in this action;

c. Thomas P. Muchisky for Plaintiff/Counterclaim-Defendants and Steven J. Daffer for Defendants/Counterclaim-Plaintiffs;

d. Outside vendors who are assisting in this action who perform microficheing, photocopying, computer classifications or similar clerical functions, but only for so long as necessary to perform those services;

e. Court reporters at depositions or hearings and their support personnel engaged in preparing transcripts of testimony or hearings for this action who are assisting in this action;

f. Independent experts and consultants that are retained or consulted by outside counsel of record solely for the purpose of consultation or for assistance in the preparation or prosecution of claims or defenses in this action and not a competitor of the party designating the material as "Confidential" and the employees of such experts and consultants who are assisting them, provided that the party wishing to disclose such information provides opposing counsel with the identity and curriculum vitae (including

present occupation, employer and any other business affiliation) of each such individual on or before the first day of trial, or within ten (10) days after receipt of a fully executed settlement agreement or order of dismissal of this entire litigation, whichever is applicable, along with a listing of all materials designated as Confidential and/or Confidential: Attorneys' Eyes Only provided to such individual;

g. Such other persons as hereafter may be designated by written agreement of all parties in this proceeding or by order of the TTAB, such order obtained on noticed motion (or on shortened time as the TTAB may allow), permitting such disclosure.

8. Material designated "Confidential: Attorneys' Eyes Only" may only be disclosed to the persons identified in Subparagraphs a, b, d, e, f, and g of Paragraph 7 above. Documents designated as "Confidential: Attorneys' Eyes Only" may not be provided to the parties with the exception of information agreed to in writing by counsel or as ordered by the TTAB.

9. Prior to receiving any "Confidential" or "Confidential: Attorneys' Eyes Only" material, each person identified in categories c, f, and g above, inclusive, shall be provided with a copy of this Order and shall sign a statement in the form attached hereto as Exhibit A indicating that he/she has read the Order and agrees to comply with its terms.

10. Any non-party that produces information that qualifies as "Confidential" or "Confidential: Attorneys' Eyes Only" under this Order (whether by document, by deposition testimony, by interrogatory answer, or otherwise) in the course of discovery herein may designate such produced information as "Confidential" or "Confidential: Attorneys' Eyes Only" as specified in this Order and thereby obtain protection pursuant to the terms and conditions of this Order for such designated information. Neither non-parties, nor any of their representatives, shall have any right to access any material or information produced by a party or another non-

party that has been designated "Confidential" or "Confidential: Attorneys' Eyes Only" without the prior written approval of the producing party or other non-party.

11. Nothing herein shall impose any restrictions on the use or disclosure by a party of material legally obtained by such party independent of discovery in this action, whether or not such material is also obtained through discovery in this action, or from disclosing its own "Confidential" or "Confidential: Attorneys Eyes Only" material as it deems appropriate.

12. Such documents subject to this Order may be shown to and/or marked as exhibits during depositions or testimony of persons employed by the party producing the document or to the author or recipient of any such document. Such documents may be marked as exhibits and shown to the author or recipient of such document or persons who were personally involved in events described or recorded in the document during that person's deposition regardless of by whom the deposed person is currently employed, provided however, the producing party may object to such disclosure at the deposition on the grounds that disclosure will compromise the confidentiality of the information and cause injury to the producing party. In the event of such objection, interrogation with respect to the document shall be suspended and the party objecting shall move the TTAB for an Order prohibiting disclosure and interrogation within ten (10) days of the deposition. Such moving party shall have the burden of proof that such disclosure will cause damage to the moving party. In the event the motion is denied and if the objection is determined by the TTAB to be without merit, harassing and/or obstructive, or the objecting party fails to move for an Order within ten (10) days, the objecting party shall pay the costs and expenses associated with the resumed deposition.

13. If "Confidential" or "Confidential: Attorneys' Eyes Only" material, including any portion of a deposition transcript designated as "Confidential" or "Confidential: Attorneys' Eyes Only," is included in any papers to be filed with the TTAB, such papers shall be labeled on

each page "Confidential" or "Confidential: Attorneys' Eyes Only" accordingly. Such documents shall be filed in a sealed envelope upon which shall be endorsed the style of this action, the general nature of the contents of the envelope, and the following legend: "THE MATERIALS CONTAINED IN THIS ENVELOPE ARE SUBJECT TO AN ORDER TO SEAL DATED _____ AND SHALL, EXCEPT UPON FURTHER ORDER OF THE TTAB, BE MADE AVAILABLE ONLY TO COUNSEL OF RECORD OF THE APPLICANT AND THE OPPOSER, AND THE TTAB'S SUPPORT PERSONNEL."

14. In the event that any "Confidential" or "Confidential: Attorneys' Eyes Only" material is used in any hearing or trial in this action, it shall not lose its confidential status through such use, and the party using such material shall preserve its confidentiality during such use.

15. All "Confidential" or "Confidential: Attorneys' Eyes Only" material not reduced to documentary, tangible, or physical form or which cannot be conveniently designated in the manner set forth in other parts of this Order shall be designated by the producing party by informing the receiving party in writing. The failure of a party to designate in the first instance material as "Confidential" or "Confidential: Attorneys' Eyes Only" material shall not preclude that party from subsequently designating the material as "Confidential" or "Confidential: Attorneys' Eyes Only."

16. The inadvertent production during discovery of any confidential information, or information subject to the Attorney-Client Privilege, work product immunity, or other privilege, shall be without prejudice to any claim that such material is privileged or protected from discovery by the work-product immunity, or that such material is entitled to confidential treatment. A producing party may notify the other parties that documents that should have been designated "Confidential" or "Confidential: Attorneys' Eyes Only" under the terms of this Order

were inadvertently produced without being designated as such. Upon receiving such notice from the producing party, the party receiving such notice shall immediately treat the document as if it had been so designated and shall place the appropriate designation on the document within five (5) business days of receipt of such notice. Also within five (5) business days of receipt of such notice, the receiving party shall notify in writing all individuals who, to the best of the receiving party's attorney's knowledge or recollection, have seen, had access to, or learned the contents of, such documents, that such documents are "Confidential" or "Confidential: Attorneys' Eyes Only" and that further disclosure by them is strictly prohibited. On or before the first day of trial, or within ten (10) days after receipt of a fully executed settlement agreement or order of dismissal of this entire litigation, whichever is applicable, the receiving party shall provide the producing party with copies of the written notifications and an accompanying list of the individuals to whom disclosure has or may have been made. Nothing in this Paragraph shall apply to those persons designated in Paragraph 7 or Paragraph 8 of this Order, as applicable. No party shall be held in breach of this Order if, before receipt of such notice, any documents inadvertently produced without being designated as "Confidential" or "Confidential: Attorneys' Eyes Only" were disclosed to any person(s) not authorized to receive "Confidential" or "Confidential: Attorneys' Eyes Only" material under this Order.

17. This Order shall be without prejudice to the right of the parties (i) to bring before the TTAB at any time the question of whether the use of this Order should be restricted, (ii) to present a motion to the TTAB for a separate protective order as to any particular document or information, including restrictions differing from those as specified herein, or (iii) to bring before the TTAB at any time a motion to change the designation of any confidential material from the classification of "Confidential: Attorneys' Eyes Only" to "Confidential," or from "Confidential" to non-confidential regardless of whether the material was produced by a party or third-party.

This Order shall not be deemed to prejudice the parties in any way in any future application for modification of this Order. Until the TTAB rules on such a motion, the documents and information in question shall be treated in accordance with this Order under the designation being challenged by the motion.

18. Any party's failure to challenge a designation of any document or information as "Confidential" or "Confidential: Attorneys' Eyes Only" pursuant to this Order shall be without prejudice to the right of any party to contest the substantive legal status of such designated material as trade secret or confidential material.

19. This Order shall survive the final termination of this action, to the extent that the information contained in "Confidential" or "Confidential: Attorneys' Eyes Only" material is not or does not become generally known to the public, and the TTAB shall retain jurisdiction to resolve any dispute concerning the use of information disclosed hereunder. Within twenty (20) days following the termination of this case, counsel for the parties shall assemble and return to each other all documents, material and deposition transcripts designated as "Confidential" or "Confidential: Attorneys' Eyes Only" and all copies of same, or shall certify the destruction thereof, except that the attorney of record may retain one (1) copy of any designated documents attached to any pleading filed with the TTAB. For the purposes of this agreement, "termination of this case" shall mean either the settlement of this proceeding or the exhaustion of all appeals or other judicial review which may be brought by either party, including petition for writ of certiorari to the United States Supreme Court or the expiration of all time periods which would permit such appeals or judicial review. In addition, prior to the expiration of thirty (30) days after final judgment or other disposition of this proceeding or thirty (30) days after receipt of a mandate from the Court of Appeals, in the case of any appeal, either party may move for an order either extending the seal period or returning sealed documents to the filing party.

20. In connection with any non-party document production in this action, each party shall be afforded reasonable opportunity to review those documents whose production has been called for and to designate, not less than five (5) business days after receipt of notice by fax ("Notice") from the party who obtains the non-party production, any documents or portions of such documents as "Confidential" or "Confidential: Attorneys' Eyes Only" pursuant to the applicable terms of this Order, provided that no party shall disclose in any manner, any such third party produced documents, whether designated as "Confidential" or "Confidential: Attorneys' Eyes Only" material or not, prior to five (5) business days after serving said Notice on all other parties in this cause of action. Such designation shall be made either in a manner agreed upon by counsel or in such manner as is reasonable under the circumstances (e.g., by identifying the Bates numbers of the designated documents or by stamping the appropriate legend on copies of the designated documents and delivering the copies to opposing counsel).

21. Neither the taking of nor the failure to take any action to enforce the provisions of this Order shall constitute a waiver of any claim or defense in the trial of this action or any other action, including, but not limited to, the claim or defense that any such information is or is not proprietary to any party or other person or that such information embodies trade secrets of any party or other person. The procedures set forth herein shall not affect the rights of the parties or other person to object to discovery on any permissible grounds, including but not limited to the right of any party or non-party to oppose production of any material on the ground of attorney-client privilege, work product immunity, or relevance. Nor shall they relieve a party of the necessity of proper response to discovery devices.

22. The restrictions set forth in this Order will not apply to information which is known to the receiving party or the public before the date of transmission to the receiving party, or which becomes known to the public after the date of its transmission to the receiving party,

provided that such information does not become publicly known by any act or omission, either directly or indirectly, of the receiving party, its employees or agents which would be in violation of this Order.

23. This Order shall not abrogate or diminish any contractual, statutory or other legal obligation or right of any party or other person with respect to any "Confidential" or "Confidential: Attorneys' Eyes Only" information or documents.

24. This Order shall apply to any and all copies, writings, and notes made from or derived from information or documents designated as "Confidential" or "Confidential: Attorneys' Eyes Only."

25. The parties agree forthwith to submit this Stipulated Protective Order to the TTAB to be "So Ordered" and further agree that, prior to approval by the TTAB, this Stipulated Protective Order shall be effective as if approved.

Approved as to form:

By: _____
Frank B. Janoski
Bridget Hoy
Lewis, Rice & Fingersh, L.C.
500 N. Broadway, Suite 2000
St. Louis, MO 63102-2147
Phone: (314) 444-7600
Fax: (314) 241-6056

Attorneys for Opposer Sybaritic, Inc.

By: _____
Lionel L. Lucchesi
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131-3615
(314) 238-2400 Phone
(314) 238-2401 Facsimile

Attorneys for Applicant Thomas P. Muchisky

SO ORDERED:

Date

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.,)	
)	
Opposer,)	
)	
v.	)	Opposition No. 91/163,999
	)	Serial No. 78/282,661
THOMAS P. MUCHISKY,)	
)	
Applicant.)	

EXHIBIT A
AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

In consideration of the disclosure to me or production by me of certain information, which is or, upon production, may be designated as CONFIDENTIAL and/or CONFIDENTIAL: ATTORNEYS' EYES ONLY, subject to a Protective Order entered in the above-captioned case, I agree as follows:

1. I have read the Protective Order in this case, and I agree to be bound by its terms.
2. I understand that if I violate the terms of the Protective Order, I may be subject to a contempt of court proceeding.
3. I agree to submit myself to the personal jurisdiction of the Trademark Trial and Appeal Board in connection with any proceedings concerning the Protective Order.
4. I declare the foregoing is true under penalty of perjury and pursuant to 28 U.S.C. § 1746

Dated: _____

(Signature)

(Print Name)

(Address)